No. 2055

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of S. C. OSBORN, doing business as S. C. Osborn & Company, Bankrupt.

PURCELL SAFE COMPANY (a corporation),

Appellant,

vs.

NELSON W. PARKER, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

SUPPLEMENTAL BRIEF OF APPELLEE.

WALTER A. McCLURE,
HENRY F. McCLURE,
WM. E. McCLURE,
Attorneys for Appellee.

Filed this.....day of November, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2055

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of S. C. OSBORN, doing business as S. C. Osborn & Company, Bankrupt.

PURCELL SAFE COMPANY (a corporation),

Appellant,

vs.

NELSON W. PARKER, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

---

SUPPLEMENTAL BRIEF OF APPELLEE.

Supplemental Argument.

The Amendment of 1910 to Section 47a (2) of the Bankruptcy Act, with respect to conditional sales

and the title vested in a trustee in bankruptcy, has been construed in the following recent cases:

In re Franklin Lumber Co., (E. Dist. Pa., decided May, 1911), Fed. ,26 A. B. R. 37;

In re Clarence S. Hammond (Nor. Dist. Ohio, decided March, 1911), 188 Fed. 1020, 26 A. B. R. 336;

In re Gehris-Herbine Co., (E. Dist. Pa., decided July, 1911), 188 Fed. 502, 26 A. B. R. 470;

In re Bazemore (Nor. Dist. Ala., decided May, 1911), 189 Fed. 236, 26 A. B. R. 494;

In re Calhoun Supply Co., (Nor. Dist. Ala., decided July, 1911), 189 Fed. 537, 26 A. B. R. 528;

In re Hartdagen (Middle Dist. Pa., decided July, 1911), 189 Fed. 546, 26 A. B. R. 532.

In the case of In re Gehris-Herbine Co., supra, the court also considered that portion of the 1910 Amendment to Section 47a (2) which provides that "trustees * * * as to all property not in the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied". In that case a subsequent agreement appeared purporting to revest possession and title in the vendor. Nevertheless the court refused to permit redelivery, holding that the transaction was a sale with a condition as to title an-

nexed, and that such a condition could not be enforced against execution creditors, and that the trustee must be deemed an execution creditor under the above amendment.

We think it will serve no useful purpose to discuss the decisions of the courts as to what is, or is not, a signature. There is a labyrinth of rulings. As to this case there seems to be no authority directly in point on that proposition. We have no quarrel with the cases cited in appellant's brief. But it has been held that a printed signature is not the signature of the party sought to be bound.

> Nightingale vs. Oregon Cent. R. Co., 18 Fed. Cas. No. 10,264, 2 Sawy. 338.

In the case of In re Hartdagen, supra, Judge Witner says that "the intention of the parties must be ascertained from the writing", a suggestion in line with the conclusion of Judge Hoyt, the referee, in the case at bar, that the trustee should not be required to meet "extraneous proof as to the circumstances under which the instrument was signed", and that "the signature should be so placed upon the instrument to be recorded so as to show" in itself "a proper signing by the corporation".

For the purpose of the argument let us assume that there is no conditional sale statute of the State of Washington. Then certainly the question as to the title vested in the trustee and the title claimed to have been reserved by the Purcell Safe Company

must be determined by the Bankruptcy Act; and in such event the case comes squarely within, and must be governed by, Section 47a (2) as amended. As to the property in question the trustee is therefore "vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings theron", the property having come into the custody of the Bankruptcy Court. If the ruling of Judge McPherson, in the case of In re Gheris-Herbine Co., supra, is to be followed, the transaction between the appellant and the bankrupt was a sale and not a bailment. Therefore the conclusion necessarily follows that the title of the trustee must be held paramount.

The state statute is not in derogation of the Bankruptcy Act, but adds thereto. The case for the trustee becomes stronger when the state statute is considered. The court will observe that the statute is affirmative in form, and not negative; that sales of personalty placed in the possession of the vendee *shall be absolute* unless certain requirements are fulfilled. Those requirements are clearly set forth. There is no ambiguity or uncertainty. Compliance therewith is easy. There is no reasonable excuse for the appellant's failure to comply with the plain requirements of the statute. Strict construction of the state statute is essential if its manifest purpose is to be observed.

The argument in appellant's brief (p. 12) that the appellant acknowledged the signature as its own

by taking the instrument to the office of the County Auditor and requesting that it be filed as a conditional sale contract, should not appeal to the court. The most that can be said is that thereby the creditors were charged with knowledge of the existence of the writing and of its terms and conditions and of its manner of execution. It was no more potent to reserve the title in the appellant than an improperly executed deed is to convey real property. The conditional sale statute of the State of Washington and the provisions of the Bankruptcy Act are both to be read into the instrument, and the creditors of the bankrupt (and in consequence the trustee) have therefore the full benefit of the omissions from, and the defects in, the writing, *as the instrument appeared on file,* and had the same from the date it was filed.

Nor should the argument in reference to the statute of frauds (appellant's brief, pp. 13-14) have weight as to the sufficiency of appellant's signature to the writing. "The party to be charged" under the statute of frauds is the vendee. In this case "the party to be charged" is the bankrupt. But appellant's contention is that the trustee is "the party to be charged". The rights, remedies and powers of the trustee are greater than one standing in the shoes of the bankrupt, for the trustee represents the creditors as well. The trustee cannot be "the party to be charged", for, as we have seen,

he has the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings.

Bankruptcy Act, Sec. 47a (2), Amendment 1910.

This is not a case where fraud is charged, or where there are even suspicions of fraud; but we think the court must determine the ruling to be made in this case from the standpoint of fraud. The evident purpose of the conditional sale law of the State of Washington was to prevent a fraudulent debtor, or a fraudulent creditor, or both, from robbing an estate by successfully claiming a reservation of title (or bailment, as Judge McPherson euphoniously puts it in In re Gehris-Herbine Co., supra) in the creditor as to personalty unreservedly placed in the possession of the debtor. The statute requires that the reservation of title be complete and that it shall promptly be made a public record. The object of the amendment of 1910 to the Bankruptcy Act is to achieve the same purpose.

In re Bazemore, 189 Fed. 236, 26 A. B. R. 494;

In re Calhoun Supply Co., 189 Fed. 537; 26 A. B. R. 528.

Otherwise it would be an easy matter for a principal creditor, who had been liberal with the bankrupt as to credit, and who held out to the bankrupt the promise of again aiding him in a business enterprise, to obtain the return of the merchandise there-

tofore sold by such creditor to the bankrupt and to support such redelivery by proof which could not be shown to be perjured, although such in fact. Thus estates would be impoverished and gross fraud perpetrated upon other creditors who had extended credit in the well-founded belief that the redelivered merchandise was the property of the bankrupt. The provisions of the Bankruptcy Act as to preferences will not reach a case like that, and every lawyer of experience knows that such a wrong can only rarely successfully be attacked on general equitable principles.

Clean, honest and efficient administration of the estates of bankrupts requires rigid enforcement of both the Bankruptcy Act as amended and the conditional sale law of the State of Washington. The Bankruptcy Act and the state statute were born of bitter experience, as the record of every court administering them will show. The rule of strict construction adopted in Chilberg v. Smith, 174 Fed. 805, 23 A. B. R. 483, and in American Multigraph Sales Co. v. Jones, 109 Pac. 108, 58 Wash. 649, is correct and should be applied to this case.

Respectfully submitted,

WALTER A. MCCLURE,
HENRY F. MCCLURE,
WM. E. MCCLURE,
Attorneys for Appellee.